TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 223.

A. L. GUSMAN, IN BEHALF OF SAMUEL WRIGHT, APPELLANT,

vs.

L. H. MARRERO, SHERIFF OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED MARCH 13, 1900.

(17,670.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 13, 1900.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

A. L. GUSMAN, Appearing in Behalf of SAMUEL Wright, Appellant,
versus
L. H. MARRERO, Sheriff of the Parish of Jefferson, State of Louisiana, Appellee.
No. 12849.

Mr. A. L. Gusman, appearing in behalf of Samuel Wright, appellant.

Robert J. Perkins, Esq., att'y for L. H. Marrero, sheriff of the parish of Jefferson, La., appellee.

Appeal from the circuit court of the United States for the eastern district of Louisiana, New Orleans division, to the Supreme Court of the United States of America, returnable within thirty (30) days from the 5th day of March, A. D. 1900, at the city of Washington, District of Columbia.

Transcript of Appeal.

United States Circuit Court, Eastern District of Louisiana.

A. L. GUSMAN, in Behalf of NATHAN WRIGHT,
vs.
L. H. MARRERO.
No. 12849.

Petition. Filed Jan. 20, 1900.

To the hon. 5th U. S. circuit court, holding sessions in and for the eastern district, State of Louisiana:

The petition of A. L. Gusman, of the parish of Orleans, appearing in behalf of Nathan Wright, of the parish of Jefferson, respectfully shows that the said Wright is now illegally and wrongfully held in custody by Lucien H. Marrero, sheriff of said parish of Jefferson, under a conviction, so called, of criminal assault with intent to commit rape, inflicted by the 21st judicial district court of the State of Louisiana, at a session recently held in said parish of Jefferson; that said Wright has also been sentenced to death by said court, and that said Marrero, sheriff, proposes, under said sentence and an order of execution lately received by him from Murphy J. Foster, governor, so called, of the State of Louisiana, to hang said Wright on Feb'y 9th, 1900, until dead, and will do so unless restrained therefrom by this hon. court. Petitioner further shows that said conviction was obtained and sentence passed without due process of law, in direct violation of the 14th amendment of the Constitution of these United States; that the grand jury that indicted Wright consisted of only twelve members, whilst the fundamental law of the

State, the constitution of 1879, imperatively requires that the grand jury shall consist of sixteen members, and that the assent of at least thirteen of these members shall be secured for the presentation
2 of a true bill; shows additionally that these fatal departures from an indispensable due process of law arose from the very erroneous beliefs of the hon. judge of said district court and of Gov. Foster that a so-called constitution of 1898 is the fundamental law of the State, and not that of 1879; that they erred, and that the latter is the real and valid constitution of Louisiana, petitioner in proof presents the following counts and pleas:

Count No. 1. That the constitution of 1879 being in 1896 unquestionably the fundamental law of Louisiana and the legislature its creature, the latter was without power or authority to alter, change, or add to or subtract from this fundamental law except as authorized by it to do so; hence act No. 52 of 1896, generally known as the constitutional convention law, that goes far beyond the limits of legislative authority, is *ultra vires* and absolutely null and void, and everything done under it equally null and void.

Count No. 2. That the constitution of 1879 having solely and exclusively entrusted to the legislature the right, power, and authority of deciding whether the constitution should be altered, amended, or revised, that body was without the right, power, or authority to delegate to the people of the State by said act No. 52 of 1896 the right, power, and authority of deciding this question.

Count No. 3. That the constitution of 1879 having conferred upon the legislature the sole and exclusive right, power, and authority to alter, amend, and revise said constitution, subject to a subsequent ratification of its work by the people, the legislature was without the right, power, or authority to confide and delegate through said act No. 52 of 1896, said work to a constitutional convention.

Count No. 4. That the people of Louisiana, having by the formulation of the constitution of 1879 and its subsequent enactment and ratification as effectively tied their own hands on the subject of alterations, changes, amendments, and revisions as they did those of the legislature, were consequently without the power or
3 authority to call a convention, as proposed by said act 52.

Count No. 5. That the so-called vote of the people of Louisiana in favor of a new constitution was not indicative of the sovereign will of the people, since the sovereignty of the people of a State is vested in the voters thereof, as declared in the fundemental law—no more, no less; and said election, having nevertheless been held under two unconstitutional acts, Nos. 89 and 137 of 1896 (that reduced the electorate of the State from 294,432 registered voters to a statutory electorate of only 87,240), was not, in any sense, an expression of sovereignty, and therefore of no force, effect, or validity.

Count No. 6. Said acts Nos. 89 and 137 of 1896 are unconstitutional and null and void, because:

"A." They impose new requirements and additional qualifications, which can only be done by constitutional amendments and a subsequent ratification by the people.

"B." Because they are bills of attainder, which the State is inhibited by the Federal Constitution from passing.

"C." Because they are also *ex post facto* laws, which the State is likewise inhibited from passing.

"D." Because they violate those additional guarantees for the protection of vested rights provided by the 14th amendment.

"E." Because the U. S. Supreme Court has ruled that "suffrage once granted will be protected. He who has it can only be deprived of it by due process of law."

"F." Because the two acts make a sweeping exemption from the new requirements and additional qualifications based upon wealth and money. Such classification is arbitrary, unreasonable, and unconstitutional. The equal protection guaranteed by the 14th amendment forbids it.

Count No. 8. The constitution of 1898 is additionally null and void because it lacks the essential and indespensable requi-
4 site of a subsequent ratification by the people of the State, in order to comply with the provision of the Federal Constitution exacting from every State of the Union a republican form of government.

Petitioner further shows in behalf of said Wright that the aforesaid insurrectionary, revolutionary, usurpative, and unconstitutional proceedings compel him to go outside of the State courts, and to appeal to this hon. court for protection against an ordered extrajudicial murder, under the well-established maxim of constitutional law that State courts are not competent to pass upon the validity of the constitution under which they themselves exist and from which they derive all their powers.

Wherefore, the above duly considered, petitioner prays for citation and service of petition upon the aforesaid Lucien H. Marrero, sheriff of the parish of Jefferson, State of Louisiana, commanding him to show cause, if any he has, why the said Nathan Wright, now in his illegal and wrongful custody, should not be by him set at liberty.

Petitioner further prays that, after all necessary services, legal delays, and due trial, there be judgment by this hon. court mandamusing and ordering the said Lucien H. Marrero, sheriff of the parish of Jefferson, to restore Nathan Wright to that liberty he has been wrongfully depriving him of.

Finally, petitioner prays for such general and special relief for said Wright as the law and evidence may on trial show him entitled to receive.

Respectfully submitted.

(Signed) A. L. GUSMAN.

Before me, the undersigned authority, personally appeared A. L. Gusman, to me known, who, being first by me duly sworn, says that the above facts and allegations are true and correct; that the aforesaid Wright has no adequate legal remedy in the State courts of Louisiana for the denial of due process of law, of which he is the

victim, and that his only avenue of escape from an uncon-
5 stitutional sentence of death is an appeal to this hon. court for justice and protection.

(Signed) A. L. GUSMAN.

This done and subscribed in my office, city of New Orleans, this 2nd day of January, A. D. 1900.

[SEAL.] (Signed) W. B. BARNETT, *Not. Pub.*

Before me the said A. L. Gusman also swears and says that Nathan Wright is penn*y*less and homeless, and is therefore entitled under the law to an appearance and defense of his life and liberty in this hon. court free of all costs and securities.

(Signed) A. L. GUSMAN.

Thus done and sworn before me in my office, city of New Orleans, State of Louisiana, on this 22nd day of January, A. D. 1900.

[SEAL.] W. B. BARNETT, *Not. Pub.*

Citation.

UNITED STATES OF AMERICA, }
Eastern District of Louisiana. }

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

A. L. GUSMAN, Appearing in Behalf of NATHAN WRIGHT, }
vs. } No. 12849.
L. H. MARRERO, Sheriff of Parish of Jefferson, *et als.* }

The President of the United States of America to Lucien H. Marrero, sheriff of the parish of Jefferson, State of Louisiana, Greeting:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit
6 court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 29 day of January, A. D. one thousand nine hundred, and the Independence of the United States of America the 124th year.

Teste:

[SEAL.] (Signed) E. R. HUNT, *Clerk*,
By H. J. CARTER,
Deputy Clerk.

(Endorsed:) No. 12849. United States circuit co[illegible] c, fifth circuit, eastern district of Louisiana. A. L. Gusman, appearing in behalf of Nathan Wright, *vs.* L. H. Marrero, sheriff parish of Jefferson. (Marshal's return on back:) Received by U. S. marshal, New Orleans, La., January 29th, 1900, and on the same day, month, and year I served copy hereof and accompanying petition on Lucian H. Marrero, sheriff of the parish of Jefferson, Louisiana, by leaving the same at his office, in said parish, in the hands of his deputy, Eph. Tonner, the said sheriff being absent from the office at the time of said service. (Signed) Chas. Fontelieu, U. S. marshal, by J. H. Patin, deputy U. S. marshal.

7 *Exception and Answer. Filed January* 31, 1900.

United States Circuit Court, Eastern District of Louisiana.

A. L. GUSMAN, Appearing in Behalf of NATHAN WRIGHT,
v.
L. H. MARRERO, Sheriff of the Parish of Jefferson. } No. 12849.

Now into this hon. court comes L. H. Marrero, sheriff of the parish of Jefferson, made defendant in the above numbered and entitled cause, who excepts to plaintiff's petition on the ground that this honorable court has no jurisdiction in the case; and, further excepting, defendant urges that plaintiff's petition discloses no cause of action.

In the event that defendant's exception be overruled, and only then, defendant answers that he holds no prisoner named Martin Wright nor Nathan Wright, as alleged in plaintiff's petition, but that a man named Sam. Wright, now in his custody as sheriff of the parish of Jefferson, was tried and convicted on Monday, the 11th day of December, 1899, before the honorable the twenty-first judicial district court for the parish of Jefferson, presided over by Hon. Emile Rost, judge, of the crime of "entering a dwelling-house in the nighttime, armed with a dangerous weapon, and, having so entered, having made an assault upon the body of a girl therein residing with the felonious intent to commit rape."

Further answering, defendant alleges that, pursuant to a subsequent order of the court aforesaid sentencing him to be hanged, the said Sam. Wright was committed to custody of defendant to await a day to be fixed by his excellency the governor of Louisiana for the execution of said Wright.

8 Defendant alleges that Friday, February the ninth, has been fixed by the governor of Louisiana for the execution of the orders of the said court.

Whereupon defendant prays that plaintiff's petition be dismissed.

(Signed) ROBERT J. PERKINS,
Att'y for L. H. Marrero, Sheriff — the Parish of Jefferson.

Order Fixing Exceptions.

Extract from the Minutes.

November Term, 1899.

NEW ORLEANS, WEDNESDAY, *January* 31, 1900.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

A. L. GUSMAN, in Behalf of NATHAN WRIGHT,
vs.
L. H. MARRERO, Sheriff, &c. } No. 12849.

On motion of R. J. Perkins, attorney for the defendant, it is ordered that the exceptions filed by defendant to the petition herein be fixed for trial on Friday, February 2, 1900, at 11 o'clock a. m., and that counsel for petitioner be notified hereof.

Feb'y 2, 1900.—(Case continued to Feb'y 3, 1900.)

Hearing and Judgment Sustaining Exceptions.

Extract from the Minutes.

November Term, 1899.

NEW ORLEANS, SATURDAY, *February* 3, 1900.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

9 A. L. GUSMAN, on Behalf of NATHAN WRIGHT,
vs.
L. H. MARRERO, Sheriff of the Parish of Jefferson. } No. 12849.

This cause came on to be heard this day upon the exceptions of jurisdiction and no cause of action filed by the defendant—R. J. Perkins appearing for the exceptor, A. L. Gusman for Nathan Wright—and was argued by A. L. Gusman and by R. J. Perkins, attorney for the defendant, and submitted.

Whereupon and on consideration thereof it is ordered, adjudged, and decreed that both the exceptions be sustained and the petition dismissed.

Motion for New Trial. Filed Feb. 5, 1900.

STATE OF LOUISIANA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

A. L. GUSMAN, in Behalf of SAMUEL WRIGHT,
vs.
L. H. MARRERO, Sheriff. } No. 12849.

And now comes A. L. Gusman and moves this hon. court for a new trial on the following grounds:

First. That the court erred gr-ev*i*ously and to Wright's prejudice and injury in holding that this is a mandamus suit. No writ is needed, none was asked, and the words "mandamus" and "writ" are nowhere to be found in the petition. No perpetuation of the writ of mandamus that has no existence is either asked or denied. The petition and prayer shows that this is simply an ordinary action. The summons to the defendant Marrero evidences the same thing, and his exceptions and answer are additional proofs of this fact.

Second. The court also erred gr-ev*i*ously when it refused to allow a trial of the merits of the question, since this was necessary in order to show whether or not Sheriff Marrero, in holding Wright in forcible custody under an assumption of governmental authority, was not invading Wright's constitutional rights and guarantees without due process of law.

Third. The court also erred gr-ev*i*ously and injuriously in ruling that appearer's contentions as to jury trials and juries are untenable, on the grounds that amendments 4, 5, 6, 7 of the Federal Constitution do not apply to State courts, as held by the U. S. Sup. Court in the 110 U. S. Supreme Court Report in a California case, the said court since then having held that they do.

4. That this hon. court furthermore gr-ev*i*ously and injuriously erred in holding that appearer's eighth count involves a political question over which Congress alone has jurisdiction. This was once true, but it is so no longer, for Congress a number of years ago settled the question affirmatively, and it is now the duty of this court to enforce this decision just as much as it is its duty to enforce the provisions of the statutes of Congress.

5. The court additionally erred in holding that Wright had no valid right of action, since a resort to mandamus proceedings was not the proper remedy. As no such resort was ever made the decision is clearly erroneous.

Respectfully submitted.

(Signed) A. L. GUSMAN.

11 *Order Fixing Motion for New Trial.*

Extract from the Minutes.

November Term, 1899.

NEW ORLEANS, TUESDAY, *February* 6, 1900.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

A. L. GUSMAN, in Behalf of N. WRIGHT,
vs.
L. H. MARRERO, Sheriff. } No. 12849.

It is ordered by the court that the motion, this day presented, by petitioner for a new trial be fixed for hearing on tomorrow at 10.30 a. m., and that counsel for both parties be notified forthwith.

Order Refusing New Trial.

Extract from the Minutes.

November Term, 1899.

NEW ORLEANS, WEDNESDAY, *February* 7, 1900.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

A. L. GUSMAN, in Behalf of NATHAN WRIGHT,
vs.
L. H. MARRERO, Sheriff, *et al.* } No. 12849.

The motion for a new trial herein filed by the petitioner came on this day to be heard—present, A. L. Gusman, for petitioner; R. J. Perkins, for defendant—and was submitted by both parties without argument.
On consideration thereof it is ordered that a new trial be refused.

12 *Judgment.*

Extract from Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division, November Term, 1899.

NEW ORLEANS, SATURDAY, *February* 3, 1900.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, district judge.

A. L. GUSMAN, in Behalf of NATHAN WRIGHT,
vs.
L. H. MARRERO, Sheriff of the Parish of Jefferson. } 12849.

This cause came on to be heard upon the exceptions of jurisdiction and no cause of action filed by the defendant—R. J. Perkins appearing for exceptor, A. L. Gusman for Nathan Wright—and was argued by A. L. Gusman and by R. J. Perkins, att'y for the defendant, and submitted.

Whereupon and on consideration thereof it is ordered, adjudged, and decreed that both of the exceptions be sustained and the petition dismissed.

Judgment rendered February 3, 1900.

Judgment signed February 8, 1900.

(Signed) CHARLES PARLANGE, *Judge.*

13 *Petition and Order for Appeal. Filed February 9th,* 1900.

U. S. Circuit Court, Eastern District of Louisiana.

A. L. GUSMAN, Appearing in Behalf of SAMUEL Wright,
vs.
LUCIEN H. MARRERO, Sheriff of the Parish of Jefferson, State of Louisiana. } No. 12849.

And now comes A. L. Gusman, appearing in behalf of Samuel Wright, and respectfully prays this hon. court for appeal to the United States Supreme Court, returnable according to law.

In behalf of this application appearer presents the following assignment of errors:

First. That the court erred in holding that this is a mandamus suit. No writ of mandamus is needed and none was asked.

The words "mandamus" and writ are nowhere to be found in the petition. No perpetuation of any writ is asked or is desirable. This is simply an ordinary action, this court being the court of original jurisdiction, the State courts being incompetent to pass upon the controlling issue of this case—the validity of the constitution of 1898.

Second. The court erred in refusing to allow a trial of the merits of the case, since such a trial was necessary in order to show whether or not the sheriff, in holding Wright in forcible custody under an assumption of governmental authority, was or was not invading Wright's constitutional rights and guarantees under the 14th amendment.

Third. That the court also erred in holding that appearer's contentions as to juries and jurors *was* erroneous, because amendments 4, 5, 6, and 7 of the Federal Constitution do not apply to
14 State courts, as decided by the U. S Supreme Court in 110 U. S. Reports, the said court having decided since that decision was rendered that they do apply to State courts.

Fourth. That the court also erred in holding that the 8th count of the petition involves a political question, over which Congress alone has jurisdiction.

This was once true, but it is so no longer, Congress having a few years ago settled the question affirmatively and in the manner favored by the court, and it is now therefore the duty of this court to enforce this settlement as much as it is its duty to enforce the provisions of the statutes of Congress.

Fifth. The court additionally erred in holding that Wright had no right of action under the mandamus proceedings, the petition showing an absolute absence of such proceedings.

Respectfully submitted.

(Signed) A. L. GUSMAN.

The foregoing duly considered, an appeal to the Hon. United States Supreme Court is hereby granted the applicant, returnable according to law, upon petitioner giving bond in the sum — fifty dollars.

New Orleans, La., February 9th, 1900.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

Bond for Appeal. Filed February 19th, 1900.

UNITED STATES OF AMERICA:

Know all men by these presents that we, A. L. Gusman, of the parish of Orleans, State of Louisiana, acting in behalf of Samuel Wright, of the parish of Jefferson, State of Louisiana, as prin-
15 cipal, and James Lewis, of the parish of Orleans, State of Louisiana, as surety, are held and firmly bound, jointly and severally, unto Lucien H. Marrero, sheriff of the parish of Jefferson, State of Louisiana, in the sum of fifty (50) dollars, lawful money of the United States of America, to be paid to the said Lucien H. Marrero, sheriff of the parish of Jefferson, State of Louisiana, and his heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the — day of the month of February, in the year of our Lord nineteen hundred (1900).

Whereas the said principal, A. L. Gusman, having heretofore, to wit, on the 9th day of February, 1900, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the third day of February, 1900, by the circuit court of the United States for the fifth circuit, holding session in and for the district of Louisiana, in the suit of A. L. Gusman, acting in behalf of Samuel Wright, *vs.* Lucien H. Marrero, sheriff of the parish of Jefferson, State of Louisiana, being No. 12849 of the docket thereof:

Now the condition of the above obligation is that if the above-bounden A. L. Gusman, plaintiff and appellant, shall prosecute the said appeal to effect and shall answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) A. L. GUSMAN.
JAMES LEWIS.

Signed, sealed, and delivered in the presence of—
—— ——.

This bond approved February 19th, 1900.
CHARLES PARLANGE, *U. S. Judge.*

16 UNITED STATES OF AMERICA, } ss:
District of Louisiana, }

Personally appeared James Lewis, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in the city of New Orleans, State of Louisiana, and is worth the full sum of fifty ($50.00) dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) JAMES LEWIS.

Subscribed and sworn — before me this 19th day of February, 1900.

(Signed) E. M. FULLER,
Deputy Clerk, U. S. Circuit Court, Eastern District of Louisiana.

(Endorsed:) No. 12849. United States circuit court, district of Louisiana. A. L. Gusman, in behalf of Samuel Wright, *vs.* L. H. Marrero, sheriff, parish of Jefferson. Bond for appeal. Filed February 19th, 1900. (Signed) H. J. Carter, d'y clerk.

Bond for Writ of Error. Filed February 19th, 1900.

Know all men by these presents that we, A. L. Gusman, of the parish of Orleans, State of Louisiana, acting in behalf of Samuel Wright, of the parish of Jefferson, State of Louisiana, as principal, and James Lewis, of the parish of Orleans, as surety, are held and firmly bound unto Lucien H. Marrero, sheriff of the parish of Jeffer-

son, State of Louisiana, in the full and just sum of fifty (50) dollars, to be paid to the said Lucien H. Marrero, sheriff of the parish of Jefferson, State of Louisiana, and his certain attorneys, executors, administrators, or assigns; to which payment, well and truly
17 to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of February, in the year of our Lord one thousand nine hundred (1900).

Whereas lately, at a circuit — of the United States, fifth judicial circuit, holding session in and for the eastern district of Louisiana, in the city of New Orleans, in a suit pending in said circuit court, wherein A. L. Gusman, of the parish of Orleans, is plaintiff and Lucien H. Marrero, sheriff of the parish of Jefferson, defendant, judgment was rendered against the said plaintiff, A. L. Gusman, and in favor of the said Marrero, sheriff, the defendant; and the said A. L. Gusman, plaintiff, having obtained a writ of error and filed a copy -hereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Lucien H. Marrero, sheriff, citing and admonishing the said Marrero to be and appear at the Supreme Court of the United States, to be holden at Washington, District of Columbia, within thirty days from Feb. 9, 1900, having been issued and served:

Now, the condition of the above obligation is such that if the said A. L. Gusman, plaintiff, shall prosecute this writ to effect, and answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) A. L. GUSMAN.
JAMES LEWIS.

Sealed and delivered in the presence of—
—— ——.

This bond approved February 19th, 1900.
(Signed) CHARLES PARLANGE, *U. S. Judge.*

18 UNITED STATES OF AMERICA, }
Eastern District of Louisiana, } *ss:*

Personally appeared James Lewis, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in the city of New Orleans, State of Louisiana, and is worth the full sum of fifty ($50.00) dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) JAMES LEWIS.

Subscribed and sworn — before me this 19th day of February, 1900.

(Signed) E. M. FULLER,
Deputy Clerk, United States Circuit Court,
Eastern District of Louisiana.

(Endorsed:) No. 12849. United States circuit court, eastern district of Louisiana. A. L. Gusman, in behalf of Samuel Wright, *vs.*

L. H. Marrero, — parish of Jefferson. Bond for writ of error. Filed February 19th, 1900. (Signed) H. J. Carter, d'y clerk.

19 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to L. H. Marrero, sheriff of the parish of Jefferson, State of Louisiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within 30 days from date hereof, pursuant to a motion and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein A. L. Gusman, in behalf of Samuel Wright, is plaintiff and appellant and you are defendant and appellee, to show cause, if any there be, why the judgment rendered against the said A. L. Gusman, as in said motion mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5 day of March, in the year of our Lord one thousand nine hundred.

CHARLES PARLANGE, *Judge.*

20 [Endorsed:] E. United States circuit court, eastern district of Louisiana. No. 12849. A. L. Gusman, in behalf of Samuel Wright, plaintiff and appellant, *vs.* L. H. Marrero, sheriff of the parish of Jefferson, Louisiana. Citation.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., M'ch 5, 1900.

On this 6th day of March, 1900, before the undersigned authority personally came T. I. Galbreth, deputy United States marshal for the eastern district of Louisiana, who, being duly sworn, deposes and says that on the 6th day of March, 1900, he served this writ on L. H. Mar-ero, sheriff of the parish of Jefferson, State of Louisiana, by handing the same to him in person.

T. I. GALBRETH,
D'y U. S. Marshal.

Sworn to and subscribed before me on this 6th day of March, 1900.

H. J. CARTER,
U. S. Commissioner.

21 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 20 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of A. L. Gusman, in behalf of Samuel Wright, *versus* L. H. Marrero, sheriff of the parish of Jefferson, Louisiana, No. 12849 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 6 day of March, A. D. 1900.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 6 day of March, A. D 1900.

CHARLES PARLANGE, *Judge.*

Endorsed on cover: File No., 17,670. E. Louisiana C. C. U. S. Term No., 223. A. L. Gusman, in behalf of Samuel Wright, appellant, *vs.* L. H. Marrero, sheriff of the parish of Jefferson, State of Louisiana. Filed March 13th, 1900.

No. 223.

Petition to reinstate.

SUPREME COURT, U.S.
FILED
NOV 5 1900
JAMES H. McKENNEY,
Clerk.

Filed Nov. 5, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 223.

The petition of Samuel Wright, appellant, by his attorneys, A. L. Gusman, A. A. Birney and Henry F. Woodard, respectfully shows that the above-entitled cause, was, on the 29th day of October, 1900, dismissed from the files of this Court for failure to print the record and pay Clerk's costs. Your petitioner now prays the Court that said cause may be reinstated on the docket of this Honorable Court because:

1. Your petitioner has paid the $55.00 Clerk's costs, as is evidenced by the annexed receipt of the Honorable Clerk of this Court, which is prayed to be taken as a part of this petition.

2. His attorney, A. L. Gusman, of New Orleans, was prevented from arriving in the City of Washington and paying the costs aforesaid because of the missing of railway connections at Hamlet, South Carolina.

Wherefore, petitioner earnestly and respectfully prays that said cause may be reinstated on the calendar of this Court.

Respectfully submitted,

SAMUEL WRIGHT, *per*
A. L. GUSMAN, *Attorney.*

A. L. GUSMAN,
A. A. BIRNEY,
HENRY F. WOODARD,
Attorneys for Petitioner.

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.,

November 2d, 1900.

Received of A. L. Gusman Fifty-five dollars as deposit in case of A. L. Gusman on behalf of Samuel Wright Appt vs L. H. Marrero Sheriff &c No 223 Oct. Term 1900.

JAS. H. MCKENNEY
Clerk Sup. Ct. U. S.
per H. C. M.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared A. L. Gusman, who, upon oath, deposes and says, that he left the City of New Orleans on the evening of October 27, en route to the City of Washington, expecting to arrive at said city on, to wit, 8.40 A. M. Monday morning, October 29; that, by reason of affiant's having missed railway connection, he was delayed and did not reach Washington until four o'clock of the same day. That since affiant arrived at Washington he has been informed by the Clerk of the Court that the case of Samuel Wright, Appellant *vs.* L. H. Marrero, Sheriff, etc., was dismissed by order of this Court for failure to pay Clerk's costs and to print the record; that he has now paid the Clerk's costs, as will appear by the receipt attached to the foregoing petition.

A. L. GUSMAN.

Subscribed and sworn to before me this 5th day of November, 1900.

GEORGE E. TRALLES,
[NOTARIAL SEAL.] *Notary Public, D. C.*

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

A. L. GUSMAN, in behalf of SAMUEL WRIGHT, *Appellant*,
vs.
L. H. MARRERO, Sheriff, &c.
} No. 223.

STATEMENT OF FACTS.

In December, 1899, Samuel Wright was indicted by a grand jury of the Twenty-First Judicial District Court for the parish of Jefferson, for the crime of assault with intent to rape, and upon trial was convicted and sentenced to be hanged. He was committed to the custody of the sheriff, Marrero, and the governor fixed February 9, 1900, as the day of his execution (Rec. 5).

The petitioner, Gusman, petitions the Circuit Court of the United States for the Eastern District of Louisiana, averring that Wright was held in illegal custody, and praying that he be discharged (Rec. 1). The sheriff appeared and excepted to the petition on the grounds: *first*, that the court was without jurisdiction; and, *second*, that no cause of action was shown (Rec. 5).

The causes shown to establish the illegality of the custody are set out in detail in the petition, and are in brief that the constitution of 1898 of Louisiana is invalid, and that the grand jury that indicted Wright was illegally constituted, consisting as it did of but twelve members, the

Constitution of 1879 providing for grand juries of not less than sixteen members.

The court below sustained both exceptions and dismissed the petition (Rec. 6).

Assignment of Errors.

1. The Court erred in holding that it was without jurisdiction to hear the petition.

2. The Court erred in holding that the petition showed no ground for discharge of the prisoner.

Argument.

The Statute of 1896, passed in pursuance of the Constitution of Louisiana, adopted in 1879, requires that a grand jury shall consist of not less than sixteen members.

Acts of Gen. Assembly, 1896, Art. 99, Sec. 6.

This provision is one of substance, for the protection of accused persons, and may not be ignored or avoided.

Thompson *vs.* Utah, 170 U. S., 343.

But Wright was condemned under an indictment found by a grand jury of but twelve members, and was thus denied due process of law.

Question of Jurisdiction.

Before we proceed to discuss the merits of the case, there is an exception for want of jurisdiction in the United States Court, filed by the defendant, which must be met and considered. Judge Parlange overruled the exception, and that in so doing he did not err there can be no doubt. We went to the United States Circuit Court for protection and relief for the very substantial reason that we had no other court to go to. Our plea of the invalidity of the Constitution of 1898 absolutely precluded our entrance into any

of the State courts, because of the well-settled principle of constitutional law, that State courts are incompetent to pass upon the validity of the constitution under which they themselves exist, and from which they derive all their powers. This principle was enunciated by this Court more than half a century ago, and the Supreme Court of Iowa has since ruled to the same effect. From these decisions we present the following extracts:

7th How, p. 39; Luther *vs.* Borden.

"Indeed we do not see how the question could be tried and judicially decided in the State court. Judicial power presupposes an established government, capable of enacting laws and enforcing their execution, and appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived, and if the authority of that government is annulled and overthrown, the power of its courts and their officers is annulled with it, and if a State should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question which it undertook to try. If it decides at all as a court, it necessarily affirms the existence and the authority of the government under which it is exercising judicial power; if the State government has no legal existence, then the laws passed by its legislature during this time are illegal and nullities; the taxes collected wrongfully collected; the salaries and compensations paid to its officers illegally paid; its settled public accounts improperly settled, and the judgments and *sentences* of its courts in civil and criminal cases *null and void*, and the officers who carried these decisions into operation answerable as trespassers."

60th Iowa, p. 608; Koehler case.

"A court which, under these circumstances, should enter upon the inquiry as to the existence of the constitution under which it was acting, would be like a man trying to

prove his personal existence, and would be obliged to assume the very point before taking the first step in the argument."

But again, and better still, we are here furthermore under an absolute right of action, because of the nature and character of our case, for—Brightley's digest, Vol. 1, p. 434—

"The United States Circuit Courts have original jurisdiction of all cases to redress the deprivation, under color of any law, statute, ordinance, regulation or usage, of any right, privilege or immunity secured by the United States Constitution."

In further support of the claim, see the following recent decisions:

139 U. S. 462; Leper *vs.* Texas.
159 U. S. 34; Scott *vs.* McNeil.
166 U. S. 226; Chicago Railway Co. *vs.* Chicago.
169 U. S. 382; Holden *vs.* Hardy.

It matters not that in this case political questions of consequence and State issues and laws are more or less directly and indirectly, involved, for they are mere incidents and divisions of our cause, and therefore do not affect the jurisdiction of this Court.

Worcester *vs.* Georgia, 6 Pet., 515.
Rhode Island *vs.* Mass., 12 Pet., 619.

This Court, in both cases cited, maintained the jurisdiction claimed, exercised it, and rendered definitive judgments. In Worcester *vs.* Georgia, the court ordered the release of Worcester.

On the Merits.

The Constitution of 1898 was and is invalid, because the convention that framed it was without right, power or authority, by a simple ordinance of its own creation, to abrogate the Constitution of 1879, that had been adopted and

ratified by the people of Louisiana, and substitute therefor an instrument of its own, that had never been adopted nor ratified by the people of Louisiana ; the usurpation of the convention being made still more flagrant when accompanied by the historic fact that at the election held for the purpose of ascertaining whether a constitutional convention should be held, only 11 per cent. of the electors voted for convention, and less than 15 per cent. of the voters of Louisiana participated in the election.

As the above pleas present political questions, the solution of which belongs to Congress primarily, and not to the Judiciary, the pivotal controversy in this case is really one of history, rather than one of law, since our contention is that Congress, in 1868 and 1869, definitely settled, in the Virginia case, that the adoption and ratification by the people of a framed and formulated constitution are indispensable requirements to the establisment and maintenance of a republican form of government in a State, under the guarantee clause of the Federal Constitution, so that it is now incumbent upon the Judiciary to enforce the decision, whenever properly called upon to do so. Such an enforcement is what we ask on behalf of our client, and his existence, therefore, now entirely depends upon the fact whether we are correct as to the Virginia case. If we are, this Court should grant him protection and relief ; if we are not, an early death is his doom. The circuit judge virtually held that, as in 1847, in the Luther–Borden case of the 7th Howard, page 6, this Court had decided that Congress had not solved the question of indispensability, and as there were no later decisions on the subject, he did not consider it incumbent upon him to go outside the reports of this Court to decide whether the time and occasion had arrived for him to pursue a different course from that indicated by that decision. And from that ruling, on our application, he granted us an appeal to this Honorable Court. There are seven other pleas or counts in our petition, but they

were all abandoned in the Court *a qua*, and the fight for Wright's life made solely upon the plea of indispensability of adoption and ratification of the Constitution of 1898.

The so-called Constitution of 1898 is null and void, because it lacks the essential requisite of that adoption by the people of the State, required by the clause of the Federal Constitution, which provides that the United States shall guarantee to every State a republican form of government.

Whether the ratification of the constitution by the people of the State is an essential requisite, is a political question, the solution of which belongs exclusively to Congress.

When the Luther *vs.* Borden case (7th Howard), decided in 1847, was before this Court the question was still unsolved, so that this Court's refusal to assume jurisdiction was unquestionably correct. But the question having since then been affirmatively solved by Congress, it is now incumbent upon this Court to assume jurisdiction, and enforce the decision as far, and only as far, as our case is concerned. We base our request not only upon what was said in 1847 in the Luther-Borden case, but also upon your ruling in the Minor case (21 Wallace, 162). In that case this Court was confronted by the issue, whether or not the Missouri State Constitution, that denied to female citizens the right of suffrage, was republican in form, the direct political point presented being, as stated by Chief Justice Waite, whether or not suffrage was one of the fundamental, inherent rights and privileges of American citizenship. This Court found that this political question had been decided by Congress, and consequently assumed jurisdiction, but refused to enforce, the Congressional decision being a negative one, and therefore, not enforceable. As in our cause the reverse is true, and the plea we urge has become *res adjudicata*, we confidently claim an enforcement, and in further support of the claim we tender the following additional decisions :

21 Wall, 162; Minor *vs.* Happersett.

"The United States Constitution, in its requirement of a republican form of government, implies a duty on the part of the States themselves to provide *and maintain* a republican form of government."

Judge Cooley, in his work on constitutional limitations, section 196, emphasizes the necessity of such maintenance thus:

"Even in amending a State constitution it is possible for the people of the State to affect such changes as to deprive it of its republican character."

In the Luther–Borden case, 7th Howard, the following are the pertinent points decided:

1st. That, under the Constitution of the United States, it rests with Congress to decide which is the legal and validly established government of the State.

2d. That the question of validity is a political one in its nature, and therefore can only be definitively settled by the political power of the nation, Congress.

3d. That this is also true as to the validity of changes made in the fundamental law of the State.

4th. That the courts are incompetent to anticipate Congressional decisions upon political questions.

5th. That when Congress decides what are essentials and non-essentials as to the validity of changes made in the fundamental law of the State, the courts are bound to take notice of the decisions and to follow and enforce them, but not until then.

5 Blatchford, 12; U. S. *vs.* Baker.

"This branch of the defense involves considerations that do not belong to the courts of the country. It involves the determination of public and political questions, which belong to the departments of our government which have charge of our foreign relations—the legislative and executive departments. When these questions are decided

by these departments the courts follow the decisions, but not until then."

13 Wall., 646; White *vs.* Hart.

"The State is estopped. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the case and is concluded by it."

See also 137 U. S., 202; Jones *vs.* U. S.

And now for the Virginia case; our case in point.

The Congress of 1867 and 1868 passed three very important laws, now historically known as the Reconstruction Acts, the first of which provides that the Act of March 2, 1867, to provide a "more efficient government of the rebel States," was to be effective only "until loyal and republican governments can be legally established." Another act, and the most important of the three, provided for the readmission of ten specified rebel States to the Union, through constitutional conventions, upon the following fundamental conditions precedent:

1st. That the constitutions framed by these conventions must be republican in form.

2d. That the instruments should abolish and forever prohibit human slavery and should recognize the supremacy of the Federal Constitution and of all laws and treaties made thereunder.

3d. That these constitutions should be adopted by a direct vote of the people of the specified States.

These were all fundamental conditions as to readmission, so that another condition expressed in the act, that the first legislatures elected under those constitutions should ratify the 14th amendment before the several specified States should be entitled once more to Congressional representation has, very evidently, nothing to do with the subject of readmission, and can, therefore, be safely omitted from further consideration.

The first of the specified States to apply for readmission was Arkansas, and on June 20, 1868, the necessary act of Congress became a law, its *raison a etre* being, as expressed in its preamble, that the people of Arkansas had "framed and *adopted* a constitution of a State government which is republican."

This act, on June 25, 1868, was followed by an act readmitting conjointedly North and South Carolina, Louisiana, Georgia, Alabama and Florida, its *raison d'etre* being practically the same as that of the Arkansas act, and is thus stated: "That the people of said States have framed constitutions of State governments which arere publican, and have adopted said constitutions by large majorities of the votes cast at the elections held for the ratification or rejection of the same." Two of the specified States, Mississippi and Texas, did not apply, for the very substantial reason that the constitutions framed by their conventions, when submitted to the people, were not adopted, but rejected. Virginia, the tenth State, did apply, but, after considerable discussion in both Senate and House of Representatives, she was denied admission by a large majority in both bodies, because her constitution had not been adopted by the people of the State. A strong plea for the condonement of the nonsubmission of the instrument to the people for ratification or rejection, was presented but not accepted, Congress deciding that no plea in equity, however strong, could override a fundamental condition precedent. That the plea was nevertheless strong and reasonable, is plainly shown by the following extracts from a long, masterly and eloquent speech of Senator Roscoe Conkling, of New York, delivered in Virginia's behalf:

"Section 5 of the Act of March 23, 1867, in express terms plights the nation's faith in this regard, to recognize the State of Virginia and to restore her to representation, and recites the events upon which alone the restoration of Virginia shall depend. It was said yesterday that Virginia

had failed to avail herself of this section, and that we were therefore to dismiss it from consideration. This I deny. The operation of the section has never been interrupted by Virginia. The State framed a constitution December 6, 1867, and Congress required it to be ratified by the people, and prescribed the qualifications of voters and mode of election. The Commanding General was to conduct the election, and the Commanding General, for want of funds, did not do so. The Senate surely cannot have forgotten that General Schofield, the Commandant, reported that he had omitted to hold an election for the reason that funds had not been furnished (not by Virginia, for she was not to furnish them, but by the United States), therefore it was that Virginia, without fault of hers, was denied the right to ratify her constitution with the seven other States, which, like Virginia, had been engaged in the rebellion. Section 4 of the Act of March 23, of 1867, directed that the convention of Virginia should fix the time of holding the election at which the constitution should be submitted, and should fix the time not less than thirty days after date of notice. The day was fixed by the convention. It was the second day in June, 1868. The day came and passed, and no election was held or authorized, the officers of the United States being alone competent to authorize or hold it. * * * Thus the Act of March 23, 1867, still stands, and speaks of Virginia and for Virginia, with all the intendments and faith to be found in Section 5. The condition upon which Virginia's rights depend, have, therefore, all been complied with, some of them more literally by Virginia than by several other States, whose restoration is now complete."

To right the wrong done Virginia, a remedial act, providing for an election for the adoption or rejection of her constitution, was passed by Congress, and the necessary funds appropriated. On July 6, 1869, the election was held, and the constitution was adopted by a vote of 210,568 to 9,136, and on October 19, 1869, Virginia was readmitted into the Union, without the addition, subtraction or change of a single word or letter of her constitution as it stood

when the previous Congress had rejected her application. These cold facts, brought out by the absence in Virginia's case of a subsequent ratification, when she made her first and unsuccessful application, we urgently urge and claim proved conclusively and emphatically that our people and nation are now firmly wedded to the great cardinal principle of Republicanism, that an ultimate exercise of sovereignty by the people is indispensably necessary for the enactment and maintenance of the fundamental law of each and every State of the Union. This conclusion has now been in strict practice for over 31 years, and since the settlement of the Virginia case no less than eight States (Colorado, Washington, Idaho, Montana, Wyoming, N. Dakota, S. Dakota and Utah) have been admitted into the Union under acts predicated upon the fundamental fact that the people of those States had both framed and *adopted* constitutions which are republican in form. In support of the applicability of this long continued Congressional practice to the *res adjudicata* character of the Virginia case, we tender the following valuable authorities:

1st Cranch, p. 299; Stuart *vs.* Laird:

"A contemporary exposition of the constitution, proposed and acquiesced in for a period of years fixes its construction."

"In this case, a rule acquiesced in for a period of several years (12 years), commencing with the organization of our judicial system, affords an irresistible answer, and has fixed the construction. This practical exposition is too strong to be shaken. The question is at rest, and ought not to be disturbed."

6th Wheaton, 418; Cohen *vs.* Virginia.

"Great weight must always be attached to contemporaneous expositions."

Lawyers' Reports Annotated, Vol. 41, 337, and Vol. 44, 679:

"Construction of the constitution by usage and long exercise of power are admissible."

146 U. S., p. 1; McPherson *vs.* Blacker.

"By the construction placed on the Federal Constitution for many years, the State Legislature had plenary power to pass the impeached statute."

In passing upon the Virginia case, we beg this Court to take into serious consideration two very important facts, to wit:

1st. That Senator Lyman Trumbull, who made a very logical argument against Virginia's plea in equity, stated that "The great object of the Reconstruction Acts is to have governments FORMED *in accordance with the Constitution of the United States*, and that had Virginia done as Alabama, Arkansas, Florida, Georgia, Louisiana and North and South Carolina have done (*adopted* her constitution), she would, like them, to-day stand here as a State with all the rights of a State.

"2d. That, as clearly outlined in the debates, proceedings and votes of Congress, the southern States were reconstructed upon somewhat different theories and constructions than were formally accepted in the admission of States; that the plan of reconstruction was a national and American plan, and not a Southern nor States' right plan; that it was held that the time had come when it had been decided by the American people that we were no longer to have two scores or more of different governments, each legislating for itself, and oftentimes in contrary directions, upon innate principles and the inherent rights of men; but, on the contrary, there shall be but one arbiter and Supreme Judge, and that this arbiter and judge shall be the people of the United States, acting through their Senators and Representatives in Congress."

The following extract, from a long speech of Senator

Oliver P. Morton, of Indiana, will further illustrate the broad scope and intendment of the reconstruction acts:—

"I believe the right to reconstruct implies the right to protect the reconstructed. If after a State government has been reconstructed, the State has the right to knock this government down, and we have no right to prevent it from doing so, but simply the right to set this government up again, then our powers are very imperfect. The power to do what we have done, logically implies the power to protect what we have done, and I shall hold to that doctrine in the case of Tennessee, if she goes far enough to clearly violate the terms of her reconstruction as to deny the security of life and property to those who have been enfranchised, and to violate those conditions which we have prescribed *as essential* to a republican form of government. Those States should understand that when they have been reconstructed and readmitted, they are not even then beyond our power; that they are not at liberty to do over what they have done and impair the security they have given, but that we shall require, *in the future*, as we do now, that the security shall be preserved unimpaired."

We next beg the Court's attention to the following valuable authority; 169 U. S. 366; Holden case:—

"The power of change of the State is limited to the fundamental principles laid down in the Constitution, to which each member of the Union was bound to accede as a condition of its admission as a State."

In its act of readmission Louisiana acceded to the fundamental principle of the Federal Constitution, that every State Constitution, in order to either establish or maintain a republican form of government, must be both framed *and adopted* by the people of the State; therefore the constitutional convention of 1898, in placing in existence and force the instrument it formulated and framed, without an essential previous adoption by the people, was guilty of a breach of the pledge given in the act of reconstruction, with a resulting deed of criminal and treasonable usurpa-

tion; hence, because of this usurpation, the so-called constitution of 1898 is clearly an invalid instrument, and the constitution of 1879, *a ratified and adopted constitution*, is still the fundamental law of Louisiana.

Louisiana historically stands pledged to the fundamental principle of the indispensibility of an adoption by the people, all of her previous constitutions, five in number, having received the assent of the people before they were put into force and effect. And to darken matters, it is now well known that the convention of 1898 made this first departure from the well established rule, because of well-grounded fears of the members, that if their constitution was submitted to the people, it would fail to secure, even from a terribly reduced electorate, a majority vote. And secondly, Louisiana is furthermore judicially pledged to this great constitutional principle, her Supreme Court having held (33 La. Annual, 588, Hart case), that in order to maintain a republican form of government, to all material constitutional changes "the people's assent must be obtained *by the direct voice of the people*, in whom the State's sovereignty resides, and by whom alone it can be announced and expressed."

Furthermore, the Constitution of Louisiana of 1879, Article 1, provides that "All governments of right originate with the people; is founded on their will alone, and is instituted for the good of the whole, deriving its just powers *from the consent of the governed.*"

And Louisiana is by no means the only State that has judicially bound itself to the doctrine of essentiality of adoption by the people. The question has been passed upon by the Supreme Courts of other States, and all have ruled that a subsequent ratification is indispensible, as will be seen from the following cullings from their decisions:

3 Minn., 240; Parker *vs.* Smith:—

"A constitution is not operative until its adoption by the people, and does not change any rights or duties until

it has received such sanction." Reaffirmed in 29 Minn., 555, Secombe *vs.* Kitterson.

7 Md., 135:—

"The constitution owes its whole force and authority to its ratification by the people." Reaffirmed in 28 Md., 269, Smith *vs.* Thursby.

76 Ills., 34; Beardstown *vs.* Virginia:—

"The constitution does not derive its force from the convention which framed it, but from the people who ratified it."

75 Pa. St., 37; Wells *vs.* Bain:—

"The convention is not a co-ordinate branch of the government. It exercises no governmental powers, but is a body raised by law, by the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers it is not amenable for its acts, but when it assumes to legislate, and to repeal and replace existing institutions before they are displaced by the adoption by the people of its propositions, it acts without authority and the citizens injured thereby are entitled, under our declarations of rights, to an open court and to redress at our hands."

75 Pa. St., 59; Woods Appeal:—

"The constitutional convention cannot take from the people the sovereign right to ratify or reject the constitution or ordinance framed by it, and cannot infuse life or vigor into its work before ratification by the people."

44 N. Y., 435; People *vs.* N. Y. Central Railway Co:—

"A constitution is an instrument of government, made and *adopted* by the people for practical purposes connected with the common business and wants of human life."

This decision is predicated upon two preceding decisions of the same court, to wit, 7th N. Y., 93, and 2d Hill, 31.

33 S. E. Rep., 139; State *vs.* Jordan, a North Carolina case:—

"The people exercise the legislative powers supremely through constitutional conventions, and by ratification upon a direct referendum to themselves."

There are, likewise, decisions equally strong from the Supreme Courts of Virginia, Massachusetts, South Carolina and New Jersey—in fact, two from South Carolina.

Against this powerful array of State decisions the supporters of the anomaly, absurdity and heresy of conventional sovereignty present only an *obiter dictum* of the Supreme Court of Missouri, and another from the Supreme Court of Texas. As these so-called decisions are not decisions, but mere opinions, they fall far below the dignity and worth of decisions, and hence amount to nothing, and are unworthy of consideration. And, secondly, our judicial heretics present additionally two so-called decisions of the Supreme Court of Mississippi, and one from that of South Carolina, all of which are absolutely null and void, and worthless, inasmuch as they were rendered in defiance of the well settled principle of constitutional law, that state Courts are incompetent to pass upon the validity of the constitution to which they owe their existence and from which they derive all their powers, hence Louisiana's *fin de siecle* devotees to an absurd fallacy as to constitutional conventions have not a single prop upon which to base a reasonable plea for the salvation of their constitution of 1898 from a well merited death sentence, because of the absence of its ratification and adoption by the people of the State.

The wisdom and necessity of a subsequent ratification was well illustrated in Illinois some eleven years ago. The people of the State voted largely in favor of a constitutional convention, and subsequently elected delegates thereto. These met, framed a new constitution, and submitted it to the people for adoption or rejection. By an overwhelming majority *it was rejected.* Had the convention simply placed the instrument into force and effect, without submission, it

would, as shown by the election, thereby have been guilty of the tyranny and crime of imposing upon the governed, and against the will of the people of Illinois, a repugnant instrument, and thus violated the basic principle of a republican form of government, that the fundamental law of the State must rest upon the consent and assent of the governed.

In 1862 a similar occurrence had happened in Illinois, a framed and formulated Constitution, when presented to the people of the State for ratification or rejection, having been rejected by a decisive majority of the voters of the State. And to other States the following rejections are to be credited. To Rhode Island a proposed constitution voted down in 1824; to Wisconsin a constitution voted down by the people of the State in 1846; and to New York and Michigan, constitutions rejected by the people in 1867.

We further submit that an adoption by the people is an indispensable condition precedent to a republican form of government, and such great writers upon our National Constitution and Constitutional laws as Jameson, Cooley, Story, Bryce and Black, all concur in declaring that such a condition precedent is an essential requisite. The following brief extracts will show that this statement is correct:—

From "Jameson's Constitutional Conventions:"

SEC. 11.—"A constitutional convention never supplants the existing organization. It never governs. Though called to look into and recommend improvements in the fundamental laws, it enacts neither these nor statute laws. * * * Members of the constitutional convention are not representatives but delegates, and as delegates their function is not to enact, but to frame and recommend."

SEC. 334.—"The normal conception of a constitutional convention is that of a body, appointed by the sovereign, the people, to mature a scheme of fundamental law to be submitted to that sovereign for ratification or rejection. * * * It is bound to submit to the people the fruit of its deliberations for approval or disapproval."

Cooley's "Constitutional Limitations," sec. 32 :—

"No body of representatives, unless specially clothed with that power by the people when choosing them, can rightfully take definitive action upon the amendments or revisions. They must submit the result of their deliberations to the people, who *alone* are competent to exercise the powers of sovereignty in framing the fundamental law, for ratification or rejection. The constitutional convention is the representative of sovereignty in a very qualified sense, and for specific purpose, and with restricted authority, to put into proper form the questions of amendment or revision, upon which the people are to pass, but the changes in the fundamental law of the State *must be enacted by the people themselves.*"

From Bryce's "American Commonwealth," Vol. I, p. 422:

"Analysis: A normal constitution consists of five parts:

"1st. Definition of boundaries.

"2d. Bill of rights.

"3d. Frame of government.

"4th. Law and Administration.

"5th. The schedule which contains provisions relating to the methods of *submitting the constitution to the vote of the people*, and arrangements for the transition from the previous constitution to the new one, which is to be *enacted by that vote.* Being of a temporary character, the schedule is not strictly a part of the constitution."

From the "American and English Encyclopædia of Law," Vol. III, p. 672:

"A constitutional convention cannot take from the people their sovereign right to ratify or reject the constitution framed by it, and cannot infuse life or vigor into its work, before ratification by the people of the State."

Substantially the same in Jameson's "Constitutional Conventions," secs. 415, 416, 417 and 418.

The foregoing decisions and authorities fully explode the plea of the supporters of the constitution of 1898, that the constitutional convention act of the Legislature of 1896 justifies the action of the convention in infusing life

and vigor into its work without a previous submission to and ratification by the people, because the people of the State, at the election provided by said act, authorized what the convention did. This is bosh, and unfounded in fact, ridiculous in its pretentions and null and void, were it not untrue. It is false because the act, neither in its body, nor in its title, which, under the constitution of 1879, controls the body, is any provision found for the delegation of the authority usurped by the convention, but on the contrary, instead of providing for an enhancement of the ordinary powers of a constitutional convention, they impose serious limitations to these ordinary powers, the body containing half a score or more of very material prohibitions, and the only vote demanded of the electors was, "for a convention of limited powers," or "against a constitutional convention," which gives no intimation or indication of the highly-enhanced power claimed by the convention, and exercised by it. The only authority for the usurpatory and revolutionary action of the convention came solely from the Legislature, that was entirely destitute of such power, and, of course, was incapable of conferring a valid grant of what it did not possess; and, furthermore, the essential intimation of such a grant in the title of the act is not embraced in the title, and this adds many pounds to the worthlessness of the claims of the upholders of the constitution of 1898.

Secondly, the justificatory claim in favor of the constitutional convention, in robbing the people of Louisiana of the privilege of their adopting or rejecting the instrument framed by that body, is palpably unreasonable since the adoption and ratification of a framed constitution, before that instrument is framed, is a material impossibility. A born constitution is as indispensably necessary to the ratification and adoption of that instrument as a born child is indispensably necessary to the christening and adoption of that child.

And thirdly, admitting for argument sake that the justi-

ficatory claims are sustained by facts such as are claimed to exist, the lack of an adoption by the people of the constitution as framed, would still remain a fatal defect, since the action of the convention would nevertheless still remain usurpatory, and revolutionary, and null and void, because still conflictive with and repugnant to the decision of Congress in the Virginia case, which is binding upon every State of the Union, and upon all the people of the United States, and which demands adoption *after* the constitution is framed, and not before it is framed. Here the legal maxim that "the law intends what is agreeable to reason, and does not suffer an absurdity" is very appropriate.

We now tender another valuable and appropriate feature.

By Article 5 of the constitution, a national constitutional convention can be called by Congress, when applied for by two-thirds of the States of the Union, but the work of such convention is limited to formulating and framing a constitution, the constitution furthermore providing for a subsequent ratification and adoption by two-thirds of the states before the instrument shall go into force and effect. This illustrates once more how firmly wedded our people are to the great cardinal principle of genuine republicanism, that an ultimate exercise of sovereignty by the people is essential for the valid enactment of all fundamental laws.

When this Article 5, of the National Constitution was under discussion in the constitutional convention of 1787, a move was made by some of the members to reject the provision of a subsequent ratification by the States. This was stubbornly resisted, Gov. Edmund Randolph, of Virginia (afterwards one of the Attorney-Generals of Washington's Administration), leading the opposition, and closing a grand effort in behalf of popular sovereignty, with these thrilling words: "Conventional sovereignty is an anomally and absurdity. In a republic there can be, and ought to be, only one kind of sovereignty, that of the people."

When the vote was taken, the members of the conven-

tion evidenced their appreciation of Gov. Randolph's oration by killing the proposed amendment by a majority of more than three to one.

A few words as to an important fact as to previous occurrences will add greatly to the value of Gov. Randolph's success.

As well known by all persons familiar with the history of Virginia, to that State belongs the honor of having elected the first delegation to the constitutional convention of 1887. Soon after their election these delegates met for consultation, and after electing George Washington for their chairman, they afterwards, among other things, selected James Madison to "prepare the outlines of a constitution to serve as a basis for their future actions." Madison promptly executed the work entrusted to him, and submitted it to the delegation, by which it was endorsed. Now, we have his declaration that in his labors he was guided, from first to last, "With the fixed principle that the new system should be *ratified by the people* of the several States."

Shortly after the organization of the convention Governor Randolph, who had been persuaded by Madison to act as leader of the delegation, Washington having been elected president of the convention, and to take a foremost part in the convention, presented the plan to that body that received it so favorably that the document that soon became known as the "Virginia Plan," according to one of America's best historians, "served the convention as a chart for its voyage from this presentation on May 25, 1787, to the wished for haven, which was reached when that body had framed the constitution and adjourned, and left its adoption and ratification to the people of the States."

Curtis' "Constitution of the United States," Vol. II, book 4, p. 482:—

"In the National Convention it was universally acknowledged that the people of the States were the fountain of all political power."

Curtis' "Constitution of the United States," Vol. II, book 4, p. 472:—

"By the guarantee clause of the constitution for a republican form of government, it became one of the essential characteristics of the guarantee that no other form of government should be permitted by Congress to be established by a State."

By the Louisiana Constitution of 1898 a large majority of the legal voters of the State have been, through the anomally of conventional sovereignty, eliminated from the electorate of the State, and over 190,000 native-born Americans placed in the thralls of political bondage, and made aliens in the land of their nativity and exiles in their own homes. All essential vestiges of a republican form of government are ruthlessly banished from its portals, and the abomination and putridity of English oligarchy substituted therefor.

By the United States Constitution, and in consonance with the ruling of the United States Supreme Court in 16 Wallace, p. 162, every American citizen is made the lucky and enviable possessor of a membership in our nation, but by the constitution of Louisiana this membership, as regards a majority of the American citizens of that State, has been made practically worthless, and an object more of humiliation than one of pride and exaltation.

By the United States Constitution, as held by the United States Supreme Court in 16 Wallace p. 36, American citizenship is constitutionally the primary citizenship everywhere throughout our nation, and State citizenship only and merely a secondary and derivative citizenship, but for Louisiana the constitution of that State has inverted this order, and to-day, in that State, State citizenship is the

primary and superior citizenship, whilst American citizenship has been debased and degraded so low that about the utmost that can be reasonably said of it is that it is, in Louisiana, a mere incident, practically valueless.

Furthermore, the constitution of Louisiana repudiates all the fundamental principles of the Declaration of Independence, and antagonizes all the essentials to a republican form of government, judicially recognized and approved by the United States Supreme Court since the readmission of that State. Equality is not one of its characteristics, but on the contrary it rests upon racial intolerance, partisan greed, educational tests, money exemptions and property preferences, and reveals throughout its length and breadth a transparent, disloyal and treasonable purpose to nullify two very important articles of the Federal Constitution. Privileges and immunities to classes and races are its main and controlling features, and this makes it a government of the few, with the indelible stamps of both English oligarchy and German imperialism, and it is therefore, the very antipodes of a republican form of government.

In conclusion, an absolute indispensability of ratification by the people is the visual point at which all the horizontal lines of our authorities unite in a common effort to sustain our rights to relief and redress, and as the State courts cannot act, this common effort, we hope, may prove a sufficient power to secure us from this honorable Court the grant of our prayer, that our client, Samuel Wright, be set at liberty.

Respectfully submitted,

A. L. GUSMAN,
Attorney for Appellant.

A. A. BIRNEY,
Of Counsel.

No. 223.

Motion to advance.

FILED
OCT 8 1900
JAMES H. McKENNEY,
Clerk.

Filed Oct. 8, 1900.

Supreme Court of the United States,

October Term, 1900.

No. 223

A. L. GUSMAN, APPEARING IN BEHALF OF SAM WRIGHT, APPELLANT,

versus

L. H. MARRERO, SHERIFF OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA, APPELLEE.

Motion by Appellee to advance case for hearing.

Notice of Motion and Affidavit.

ROBERT J. PERKINS,
Of Counsel for Appellee.

Palfray-Dameron Co., L't'd, 304 Camp St., New Orleans, La.

IN THE

Supreme Court of the United States,

October Term, 1900.

No. ——

A. L. GUSMAN, APPEARING IN BEHALF OF SAM WRIGHT, APPELLANT,

versus

L. H. MARRERO, SHERIFF OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA, APPELLEE.

Motion by Appellee to advance case for hearing.
Notice of Motion and Affidavit.

Now into this Honorable Court comes Louis Herman Marrero, Sheriff of the Parish of Jefferson, State of Louisiana, appellee in the above entitled cause, and moves the Court for an order advancing said cause on the docket of this Court, and setting the same down for a hearing on a particular day, for the following reasons, to-wit:

First. This appeal is taken from a judgment of the United States Circuit Court for the Eastern District of Louisiana, denying the application of the appellant, "mandamusing and ordering" appellee, Sheriff of the Parish of Jefferson, "to restore Sam Wright to that liberty he has been wrongfully depriving him of."

The appellant was convicted of violating Article 850 of the Revised Statutes of Louisiana, relating to the crime of breaking and entering a dwelling-house in the night-time, being armed with a dangerous weapon, with intent to commit rape, etc., and making an actual assault upon one of the inhabitants thereof.

Sentence of death was passed upon him by the Twenty-first Judicial District Court for the Parish of Jefferson, State of Louisiana, and no appeal was taken to a higher State Court.

The verdict was rendered on December 11th, 1899; sentence was passed a few days afterwards, and the Governor of Louisiana fixed February 9th, 1900, as the day for the execution.

On January 29th appellee was served with a notice of the proceedings taken by appellant in the United States Circuit Court, and although no restraining order had been asked for or granted,

appellee filed his answer immediately and asked that a speedy hearing be granted.

Judgment was rendered on February 6th, refusing demand of appellant, and, after argument, a new trial was refused on February 7th.

An appeal was taken to this Court, the order was signed and was served on appellee on the very hour of the day fixed for the execution.

The order of appeal ordered no stay of proceedings. The execution is now being delayed pending this appeal.

Second. The special reasons urged by appellee for the advancement of this cause on the docket of this Court are as follows:

The case involves the prompt administration of the criminal laws of the State of Louisiana.

That a great delay has already been occasioned in the punishment of a man found guilty of violating the criminal laws of the State, which is calculated to thwart and hamper the law officers of the State in carrying out their duties.

That a speedy determination of the cause by this Honorable Court is in the interest of law and order, and is a matter of the utmost importance of the people of the whole State.

Third. The facts upon which the foregoing grounds for this motion are based will more fully

appear from the transcript of the record of this cause on file, and from the affidavit of appellee attached hereto and filed herewith, and said record and affidavit are hereby referred to and by such reference made part of this motion.

ROBERT J. PERKINS,
Of Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

A. L. Gusman, Appearing in Behalf of Sam. Wright, Appellant,

versus

L. H. Marrero, Sheriff of the Parish of Jefferson, State of Louisiana, Appellee.

Affidavit of Appellee in Support of Motion to Advance.

State of Louisiana, }
Parish of Orleans. }

L. H. Marrero, Sheriff of the Parish of Jefferson, State of Louisiana, to me personally known, being by me first duly sworn, doth depose and say:

I am the above named appellee and am fully conversant with all the facts and circumstances relating to case of the State of Louisiana versus

Sam. Wright, and with the proceedings taken by A. L. Gusman in his behalf.

I have carefully read the motion to advance in this cause, I believe that the appeal herein taken is taken solely for delay, and that it is of the greatest importance to the people of Louisiana that there be an early determination of the case, which otherwise would retard the administration of justice in the State and bring the State Courts and laws into public ridicule and contempt.

That the facts and allegations of the motion to advance are true and correct.

(Sig.) L. H. Morrow

Sworn to and subscribed before me this 16th day of August, 1900.

(Sig.) H. Gueno Dupre

A Notary Public in and for the City of New Orleans, Parish of Orleans, State of Louisiana.

Dead

Robert J. Perkins
Counsel for appellee

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

A. L. Gusman, Appearing in Behalf of Sam. Wright, Appellant,

versus

L. H. Marrero, Sheriff of the Parish of Jefferson, State of Louisiana, Appellee.

Notice of Motion to advance case.

To Sam Wright, and A. L. Gusman, appearing in behalf of Sam Wright:

You and each of you will please take notice that the appellee, by his undersigned counsel, will, on the second Monday of October, 1900, at the opening of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, in the courtroom of said Court in the Capitol Building at Washington, District of Columbia, make and submit to this said Court the foregoing motion in writing (hereto attached), to advance this cause upon the docket of said Court and to have it set down for a particular day for hearing.

Said motion will be made upon the facts and grounds set forth in said written motion, which is hereby referred to and by such reference made a part of this notice.

There will be used upon the hearing of said motion and submitted therewith, the affidavit of appellee, hereto attached, and the record on file with the clerk of said Court in this cause.

Respectfully,

ROBERT J. PERKINS,

Of Counsel for Appellee.

No. 223.

Brf. of Perkins for Appellee.

NOV 26 1900
JAMES H. McKENNEY,
Clerk.

Filed Nov. 26, 1900.

IN THE

Supreme Court of the United States.

October Term, 1900.

No. 223.

A. L. GUSMAN, APPEARING IN BEHALF OF SAM WRIGHT, APPELLANT,

versus

L. H. MARRERO, SHERIFF OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA, APPELLEE.

Statement of Case and Brief in Behalf of Defendant, Appellee.

ROBERT J. PERKINS,
Of Counsel for Appellee.

PALFREY-DAMERON CO., LTD. N. O.

IN THE

Supreme Court of the United States.

October Term, 1900.

No. 223.

A. L. GUSMAN, APPEARING IN BEHALF OF SAM WRIGHT, APPELLANT,

versus

L. H. MARRERO, SHERIFF OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA, APPELLEE.

Statement of Case and Brief in Behalf of Defendant, Appellee.

STATEMENT OF THE CASE.

This appeal is taken from a judgment of the Circuit Court of the United States for the Eastern District of Louisiana, adverse to the plaintiff, appellant herein, wherein he prayed as follows: "Wherefore, the above duly considered, petitioner prays for citation and service of petition upon the

aforesaid L. H. Marrero, Sheriff of the Parish of Jefferson, State of Louisiana, commanding him to show cause, if any he has, why the said Sam Wright, now in his illegal custody, should not be by him set at liberty.

"Petitioner further prays that after all necessary services, legal delays and due trial, there be judgment by this Honorable Court, *mandamusing and ordering* the said L. H. Marrero, Sheriff of the Parish of Jefferson, to restore Sam Wright to that liberty he has been wrongfully depriving him of.

"Finally petitioner prays for such general and specific relief for said Wright as the law and evidence on trial, may, on trial, show him entitled to receive.

"Respectfully submitted,

"A. L. GUSMAN."

Here the prayer ends, with no order from the Court *a qua*, and no application for an order.

Defendant, appellee herein, filed exceptions to the jurisdiction of the Court *ratione materiae et ratione personae*, and of no cause of action, which were maintained by the lower court.

Wright was indicted by the grand jury of the Parish of Jefferson, State of Louisiana, on December 6th, 1899, for the crime of "breaking and enter-

ing a dwelling-house in the night-time, armed with a dangerous weapon, and making an assault upon a woman therein residing, with intent to commit rape," which is made a crime by Sec. 850 of the Revised Statues of Louisiana, and the punishment is death.

The crime was charged to have been committed on November 16th, 1899.

He was tried and convicted by a properly qualified jury of twelve on December 11th, 1899.

He was defended by counsel, who were present throughout the trial, and, after conviction, made a lengthy application for a new trial.

That application was denied, and Wright was sentenced to be hanged.

No appeal was taken to the Supreme Court of Louisiana.

The Governor of Louisiana, after a certified copy of the proceedings had been sent him as the laws of that State direct, fixed and appointed Friday, February 9th, 1900, the day for the execution.

Wright, through Gusman, sought relief through the United States Court, and the execution was stayed awaiting a decision of this Honorable Court.

ARGUMENT.

It is submitted that the decision of the lower court, maintaining the exceptions filed by defendant, should be affirmed for the following reasons:

I. This Honorable Court is without jurisdiction to hear and determine this appeal for this:

(*a*) That there is no appeal allowed by law to this Court from the judgment appealed from, and

(*b*) That appellant has no interest in this cause and cannot stand in judgment herein.

II. This is not an application for a writ of *habeus corpus* nor for a writ of mandamus, but an ordinary action in which appellant has no earthly interest or concern.

III. This appeal is wholly without merit, is frivolous, and is taken for purposes of delay only, and was intended to and does interfere with, hinder and delay the execution of the criminal laws of the State of Louisiana, by its duly qualified officers.

IV. No writ of error to this Court has been applied for nor granted by the lower court.

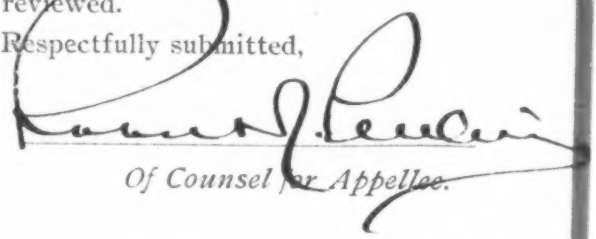
V. Appellant's sole claim to jurisdiction in the Federal Courts, showing an absence of due process of law, is the alleged fact that Sam Wright was indicted by a grand jury of twelve (12) instead of sixteen (16).

The Constitution of Louisiana of 1879 required a grand jury of sixteen; the Constitution of 1898 which became operative in July of that year (over a year before the crime with which Wright was charged was committed), reduced the number of grand jury through the State to twelve.

On the face of the papers the appellant is not entitled to relief prayed for.

This is not an application for a writ of *habeus corpus*, which is the only method under which the case could be reviewed.

Respectfully submitted,



Of Counsel for Appellee.

Supreme Court of the United States.

No. 223.—October Term, 1900.

A. L. Gusman, in behalf of Samuel Wright, Appellant, *vs.* L. H. Marrero, Sheriff of the Parish of Jefferson, State of Louisiana. } Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

[January 7, 1901.]

Mr. Justice McKenna delivered the opinion of the Court.

The appellant has not ventured to give a specific name to this action. The appellee claims that it is not an application for a writ of *habeas corpus*, nor for writ of mandamus, (this word is used in the prayer of the petition,) but that it is "an ordinary action of which the appellant has no concern."

The purpose of the proceeding is to deliver from the custody of the sheriff of the parish of Jefferson, State of Louisiana, one Samuel Wright, who is under sentence of death for the crime of assault, with intent to commit rape, for which he was convicted in the twenty-first judicial district court for the parish of Jefferson.

The appellant's petition was filed in the Circuit Court of the United States for the Eastern District of Louisiana, and alleges that he appeared on behalf of Nathan Wright. It further alleges that Wright was convicted of criminal assault with intent to commit rape and sentenced to death, and that Marrero (appellee) as sheriff "proposes, under said sentence and an order of execution lately received by him from Murphy J. Foster, governor, so called, of the State of Louisiana, to hang said Wright on February 9, 1900, until dead, and will do so unless retrained therefrom by this honorable court; . . . that said conviction was obtained and sentence passed without due process of law, in direct violation of the Fourteenth Amendment of the Constitution of these United States; that the grand jury that indicted Wright consisted of only twelve members, whilst the fundamental law of the State, the constitution of 1879, imperatively requires that the grand jury shall consist of sixteen members, and that the assent of at least thirteen of these members shall be secured for the presentation of a true bill;" and that "that these fatal departures from an indispensable due process of law arose from the very erroneous beliefs of the hon. judge of said district court and of Governor Foster, that a so-called constitution of 1898 is the fundamental law of the State, and not that of 1879; that they erred, and that the latter is the real and

valid constitution of Louisiana, petitioner in proof presents the following counts and pleas."

There is a specification of reasons, under eight "counts and pleas," why the constitution of 1898 is not the constitution of the State. The reasons are all reducible to the general and ultimate one that the constitution of 1898 was not adopted in pursuance of the provisions of the constitution of 1879, and "hence act No. 52 of 1896, (an act of the legislature,) generally known as the constitutional convention law, goes far beyond the limits of legislative authority, is *ultra vires* and absolutely null and void, and everything done under it equally null and void."

It is also alleged that certain other acts, to wit, acts Nos. 89 and 13 of 1896, are unconstitutional, because they reduce the number of registered voters, and therefore are "not in any sense an expression of sovereignty, and therefore of no force, effect or validity." The particular reasons given are that the acts are bills of attainder, *ex post facto* laws, violate the guarantees of the Fourteenth Amendment to the Constitution of the United States, take away suffrage without due process of law, make sweeping exemptions from additional qualifications of the suffrage based upon wealth and money, do not provide for ratification by the people of the State in compliance "with the provisions of the Federal Constitution exacting from every State of the Union a republican form of government."

The petition concludes as follows:

"Petitioner further shows in behalf of said Wright that the aforesaid insurrectionary, revolutionary, usurpative and unconstitutional proceedings compel him to go outside of the State courts, and to appeal to this hon. court for protection against an ordered extrajudicial murder, under the well-established maxim of constitutional law that State courts are not competent to pass upon the validity of the constitution under which they themselves exist and from which they derive all their power.

"Wherefore, the above duly considered, petitioner prays for citation and service of petition upon the aforesaid Lucien H. Marrero, sheriff of the parish of Jefferson, State of Louisana, commanding him to show cause, if any he has, why the said Nathan Wright, now in his illegal and wrongful custody, should not be by him set at liberty.

"Petitioner further prays that, after all necessary services, legal delays and due trial, there be judgment by this hon. court mandamusing and ordering the said Lucen H. Marrero, sheriff of the parish of Jefferson, to restore Nathan Wright to that liberty he has been wrongfully depriving him of.

"Finally, petitioner prays for such general and special relief for said Wright as the law and evidence may on trial show him entitled to receive.

"Respectfully submitted.

(Signed) A. L. Gusman.

"Before me, the undersigned authority, personally appeared A. L. Gusman, to me known, who, being first by me duly sworn, says that the above facts and allegations are true and correct; that the aforesaid Wright has no adequate legal remedy in the State courts of Louisiana for the

denial of due process of law, of which he is the victim, and that his only avenue of escape from an unconstitutional sentence of death is an appeal to this hon. court for justice and protection.

(Signed) A. L. GUSMAN.

"This done and subscribed in my office, city of New Orleans, this 2d day of January, A. D. 1900.

[SEAL.] (Signed) W. B. BARNETT, *Not. Pub.*"

Upon the filing of the petition and without any action of the court or of the circuit judge, the clerk or the court issued a citation, entitled in the cause and in the name of the President of the United States, to Lucien H. Marrero, sheriff of the parish of Jefferson, and summoned him to comply with the demand of the petition, (a copy of which accompanied the citation,) or to deliver his answer in the office of the clerk of the court within ten days after service thereof, with increase of one day for every ten miles Marrero's residence was distant from New Orleans, the place where the court was held.

In due time Marrero, by attorney, filed exceptions to the petition on the ground that the court had no jurisdiction in the case, and on the ground that the petition disclosed no cause of action.

The answer concluded as follows:

"In the event that defendant's exception be overruled, and only then, defendant answers that he holds no prisoner named Martin Wright nor Nathan Wright, as alleged in plaintiff's petition, but that a man named Sam. Wright, now in his custody as sheriff of the parish of Jefferson, was tried and convicted on Monday, the 11th day of December, 1899, before the honorable the twenty-first judicial district court for the parish of Jefferson, presided over by Hon. Emile Rost, judge, of the crime of 'entering a dwelling house in the night time, armed with a dangerous weapon, and, having so entered, having made an assault upon the body of a girl therein residing with the felonious intent to commit rape.'

"Further answering, defendant alleges that, pursuant to a subsequent order of the court aforesaid sentencing him to be hanged, the said Sam. Wright was committed to custody of defendant to await a day to be fixed by his excellency the governor of Louisiana for the execution of said Wright.

"Defendant alleges that Friday, February the ninth, has been fixed by the governor of Louisiana for the execution of the orders of the said court.

"Whereupon defendant prays that plaintiff's petition be dismissed."

The exceptions were set down for trial for the 2d of February, 1900, at eleven o'clock, and the petitioner's counsel was ordered to be notified. On that day the exceptions came on to be heard, and were argued, submitted and sustained, and the petition was dismissed.

On February 5, 1900, the petitioner, by his counsel, moved for a new trial on the following grounds:

"First. That the court erred grievously and to Wright's prejudice and injury in holding that this is a mandamus suit. No writ is needed, none was asked, and the words 'mandamus' and 'writ' are nowhere to be found

in the petition. No perpetuation of the writ of mandamus that has no existence is either asked or denied. The petition and prayer shows that this is simply an ordinary action. The summons to the defendant Marrero evidences the same thing, and his exceptions and answer are additional proofs of this fact.

"Second. The court also erred grievously when it refused to allow a trial of the merits of the question, since this was necessary in order to show whether or not Sheriff Marrero, in holding Wright in forcible custody under an assumption of governmental authority, was not invading Wright's constitutional rights and guarantees without due process of law.

"Third. The court also erred grievously and injuriously in ruling that appearer's contentions as to jury trials and juries are untenable, on the grounds that Amendments 4, 5, 6, 7 of the Federal Constitution do not apply to State courts, as held by the United States Supreme Court in the 110 U. S. Supreme Court Report in a California case, the said court since then having held that they do.

"Fourth. That this hon. court furthermore grievously and injuriously erred in holding that appearer's eighth count involves a political question over which Congress alone has jurisdiction. This was once true, but it is so no longer, for Congress a number of years ago settled the question affirmatively, and it is now the duty of this court to enforce this decision just as much as it is its duty to enforce the provisions of the statutes of Congress.

"Fifth. The court additionally erred in holding that Wright had no valid right of action, since a resort to mandamus proceedings was not the proper remedy. As no such resort was ever made the decision is clearly erroneous."

The motion for new trial having been submitted to the court it was refused.

A petition for appeal was presented assigning as errors substantially the grounds stated in the motion for new trial, and excepting to the court's action thereon. The appeal was allowed, and the case is here in consequence.

The contention of appellee is that this is not an application for *habeas corpus* nor for writ of mandamus, but is an ordinary action. The appellant not only concedes the fact, but takes pains to assert it. It follows necessarily that he has no cause of action. However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this. The judgment of the Circuit Court must therefore be affirmed. Even if we regard the proceeding as one in *habeas corpus*, the same result would follow. (*Davis* v. *Burke*, decided December 17 of this term.)

Judgment affirmed.

Mr. Justice HARLAN took no part in the decision.